92-1608

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

LORETTA BOWMAN and WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN

—Petitioners

vs.

CITY OF FRANKLIN, J. C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC., and WASTE MANAGEMENT OF WISCONSIN, INC.

—Repondants

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Local Counsel, STEVE ENICH
1225 West Mitchell Street
Milwaukee, WI 53204
(414) 672-8701

WILLIAM H. BOWMAN
410 Church Road, Unit 41
Ojai, CA 93023
(805) 646-4089

QUESTIONS PRESENTED

1. Whether Rule 56 requires conversion of a motion to dismiss where the district court considered "extensive submissions" in addition to those set forth in the 12(b)(6) motion.

2. Whether petitioners were denied an opportunity to submit evidence that defendants Franklin and Waste entered into a written contract to install a sewer for Waste's exclusive use which was secretly assessed ($51,000) against petitioners without notice or hearing.

3. Whether there is a conflict between the 2nd and 7th Circuit as to municipal indifference to illegality.

4. Whether there is a conflict between the District Court and the 7th Circuit as to whether the $51,000 secret assessment was made.

5. Whether federal courts have jurisdiction to determine legality of municipal assessments.

6. Whether the record of Waste's violations should have been stricken.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 12

INDEX TO APPENDICES

Appendix A — Opinion of the Court of Appeals reported in Bowman v. Franklin 980 Fed (2) 1104 (7th Cir.) 1992

Appendix B — Unreported opinion of the District Court for the Eastern District of Wisconsin.

Appendix C — Court of Appeals Denial of the Petition for Rehearing (issued January 4, 1993)

Appendix D — Amendment V to the United States Constitution
Amendment XIV to the United States Constitution
42 U.S.C. 1983
42 U.S.C. 1985

Apendix E — Wisconsin Statutes
Section 66.60 (12) (a)
Section 66.60 (12) (e)
Section 66.60 (15)

TABLE OF AUTHORITIES CITED

CASES PAGE

Carter v. Stanton,
405 U.S. 669, 671 (1971). 9

Fonte v. Board of Mgrs. of Continential Towers Condo,
848 F.2d 24 (2nd Cir. 1988)....9

Fredyma v. AT&T Network Systems, Inc.,
935 F.2d 368 (1st Cir, 1991). 10

Gaff v. Federal Deposit Ins. Corp.,
814 F.2d 311, 319 (6th Cir. 1987)....8

Kopec v. Coughlin,
922 F.2d. 152 (2nd Cir. 1991)....9

LaBounty v. Adler,
933 F. 2d 121 (2nd Cir. 1991)....9

Partridge v. Two Unknown Police Officers,
751 F.2d 1448, 1451 (5th Cir. 1985)....9

Neitze v. Williams,
490 U.S. 319 (1988). 9

Scheuer v. Rhodes,
416 U.S. 232, 236 (1973). 9

Thomas v. Scully,
943 F.2d. 259 (2nd Cir. 1991)....10

Trans Sterling Inc. v. Bible,
804 F.2d 525 (9th Cir. 1986)....7

United Mine Workers of America v. Gibbs,
383 U.S. 715, 726 (1965). 8

Walker v. City of New York,
974 F.2d. 293 (2nd Cir. 1992)....10

OTHER AUTHORITIES

25 American Jurispurdence 2d., Easments p.74 (1966).....12

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

LORETTA BOWMAN and WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN

—Petitioners

vs.

CITY OF FRANKLIN, J. C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC., and WASTE MANAGEMENT OF WISCONSIN, INC.

—Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioners, LORETTA BOWMAN et al., respecfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of plaintiffs' complaint, which sought to remedy defendants' conspiring to:

> levy a secret sewer assessment against plaintiffs without notice or hearing, for the sole use and benefit of defendant WASTE MANAGEMENT.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as LORETTA BOWMAN, WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., et al., V. CITY OF FRANKLIN, J. C. ZIMMERMAN ENGINEERING CORPORATION, WASTE MANAGEMENT OF WISCONSIN INCORPORATED, et al., 980 F. 2nd 1104 (7th Cir. 1993) and appears in Appendix A to this petition. The unpublished written opinion of the District Court for the Eastern District of Wisconsin appears in Appendix B to this petition. The Court of Appeals denial of a motion for rehearing appears in Appendix C to this petition.

JURISDICTION

The Court of Appeals opinion in this matter was filed on December 2, 1992. A timely petition for rehearing was filed. The Court of Appeals denial of the petition for rehearing was issued on January 4, 1993 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments V and XIV to the United States Constitution are set forth in Appendix D along with 42 U.S.C. 1983 and 1985.

Section 66.60 (12) (a); (12) (e) and 66.60 (15) of the Wisconsin Statutes are set forth in Appendix E.

STATEMENT OF THE CASE

Petitioners brought this action in the United States District Court for the Eastern District of Wisconsin against three defendants: Waste

Management of Wisconsin and its parent company, Waste Management of North America, Inc. (collectively "Waste"); the City of Franklin ("Franklin"); and J.C. Zimmerman Engineering Corp. ("Zimmerman"). The complaint sounded in four counts: Counts I and II allege violation of the petitioners' Federal rights under the Fifth and Fourteenth Amendments and 42 U.S.C. sects. 1983 and 1985(3) respectively; Counts III and IV allege violations of state law for trespass and interference with prospective business relations.

Franklin and Zimmerman answered the complaint, and Waste filed a motion to dismiss under Rule 12(b)(6). Zimmerman filed a motion for summary judgment under Rule 56. In a conference call on Waste's motion to dismiss, the district court stated that it had reviewed extensive written materials submitted by Waste (see P. 19, 20, 27 of Transcript, Nov. 25, 1991) and, without converting the motion to dismiss into a motion for summary judgment under Rule 56, summarily dismissed both the Federal and state claims, with prejudice, as to all defendants, pursuant to Rule 12(b)(6).

The factual basis of petitioners' complaint consists of allegations concerning the improper placement of a public sewer under petitioners' property, improper tax assessments pertaining to the sewer, and a conspiracy among the defendants to increase the burden of sewer easements on property owners by allowing industrial waste to pass through easements granted for sanitary sewers. In addition, petitioners allege in their state claims (1) an invalid easement due to insufficient signatures by the property owners, and (2) interference with prospective business relations due to the decrease in property value if hazardous industrial waste is transported through sewers on petitioners' property.

The Seventh Circuit affirmed the Rule 12(b)(6) dismissals by the district court, even though it noted that the district court strayed

from the general rule that when Federal claims are dismissed the district court ought to decline jurisdiction over remaining state claims. The Seventh Circuit ignored the factual allegations in the complaint, pertaining to insufficient signatures on the document granting the easement, in affirming dismissal of the state claims. In addition, the Seventh Circuit failed to note that the district court had considered extensive written materials submitted by Waste and that the district court did not convert the Rule 12(b)(6) motion to dismiss to a motion for summary judgment under Rule 56, as required by Rule 12 when extraneous materials are considered by a court in ruling on a motion to dismiss. The Seventh Circuit also affirmed the district court's sua sponte dismissal of Franklin and Zimmerman under Rule 12(b)(6), even though those defendants had answered the complaint and Zimmerman had recently filed a motion for summary judgment; petitioners were thereby denied the opportunity to submit any evidence in support of their claims.

Franklin's Municipal Indifference to Law

Franklin's municipal indifference is shown in the signed contract between Franklin and Waste. (Complaint, Exhibit 11) Franklin got $600,000.00 plus other consessions to connect Waste to the municipal sewer, through petitioner's land. The contract provides hold harmless agreement:

> par. 14 "...Waste shall defend the City from and against any and all liability, claims, loss, damages, interest, actions, suits, judgements, costs, expenses, attorney's fees and the like which in any manner results from or arises in the course of, out of or as a result of the performance of this agreement..."

No court need fear any claim against Franklin's citizens. Waste will pay it.

Franklin's violations of federal and state law became, to Franklin, inconsequential.

Application of Wisconsin Statutes

Wisconsin statutes give sole jurisdiction over the validity of assessments to the local circuit court to which a complete record of "all the papers in the matter," are to be transmitted by the municipal clerk. Section 66.60 (12)(a) Wisconsin Statutes.

An assessment levied under Section 66.60, is a lien against the owners' property.

Petitioners won an appeal testing the validity of the $89,000.00 assessment, the only assessment they or the state circuit court knew of. (Complaint, Exhibit 15) No damages are provided in Wisconsin. Damages were sought in federal court.

The Easement and the Assessment

The easement was given for public sanitary sewer by only one of the two owners. It was used by Franklin to install a private sewer for Waste Management, without any notice or hearing. The public records were concealed from petitioners. (Complaint, p. 5; Exhibit 7)

Petitioners were assessed $89,000.00 for public sewers along highways. They were secretly assessed an additional $51,000.00 for private sewer for Waste's exclusive use along the easement.

Almost two years after the $51,000.00 sewer was installed on the petitioner's land, the secret assessment of $51,000.00 was discovered. (Complaint, pp. 4, 5 and 6; Exhibit 6, attached to complaint)

The assessment for Waste's sewer is made specifically against petitioner's property, contrary to the agreement not to assess contained in the assessment.

Franklin's mayor admitted that the $51,000.00 assessment was made but deferred. (Comlaint, p.7; Exhibit 14) The district court agreed. The Court of Appeals stated that the assessment was never made because of the agreement not to assess in the easement, and then affirmed the district court judgement.

Zimmerman's Official Position

Zimmerman's involment in the state process was described in its report. (Compaint, p.4; Exhibit 5, p.1) It was the "authorized representative" of the City of Franklin.

Supplemental Reports on Waste Management Pursuant to Fed. R. App. P. 28j

Two reports were submitted to expand on allegations of conspirancy deprive petitioners of consitutional rights and property in paragraph 20 of the compliant, and to justify discovery,

1. The report of the District Attorney of San Diego County, California is dated March 1992, after the District Court hearing on motion to dismiss held Novemebr 25, 1991 consisting of 58 pages, it includes chapter on:
    A. Organized crime connection (p. 21) including a description of activites in Milwaukee, Wisconsin, dating back to 1962.

B. Public corruption, p. 22 Records of arrests and convictions of criminal offenses by Waste Management are listed:

a. 1985: Manager of a Waste Management subsidiary convicted, jailed and fined for bribing the mayor of Fox Lake, Illinios.

b. 1987: A lobbyist and marketing representative of Waste was arrested and convicted of bribing a Chicago alderman to acquire land for a waste transfer facility.

2. The report of the Sheriff of Ventura County, California lists complaints against Waste and convictions involving bribery and anti-trust violations including bid rigging, price fixing and price gouging.

Granting the motion to dismiss deprived petitioners of discovery based on the California reports.

There were official reports citing judgements and convictions, not mere newspaper reports mentioned in Trans Sterling Inc. v. Bible, 814 F(2) 505 (9th Cir. 1986).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Opinion below conflicts, by implication, with previous decisions of this Court, and also conflicts with decisions of other Circuits.

Improper Dismissal with Prejudice of State Claims

This court has implicitly held that when a Federal court dismisses all Federal claims in a case, before trial, then the court should decline to exercise jurisdiction over remaining state claims, in the interest of comity. United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1965). The Sixth Circuit has adopted this as a general rule in Gaff v. Federal Deposit Ins. Corp., 814 F.2d 311, 319 (6th Cir. 1987), finding error by a district court in retaining jurisdiction over state law claims for the purpose of dismissing them with prejudice after disposing of federal question claims by a Rule 12(b)(6) motion, as the district court below has done in the instant case. In the present case the district court summarily concluded that a state claim for trespass could not stand based on the theory of a sewer line crossing petitioners' property, without reference to the allegations of the complaint that the sewer easement was invalid without proper signatures of the landowners. The district court likewise failed to consider the allegations of interference with prospective business relations based on the claims of an increased burden on the property owners resulting from the conversion of a sanitary sewer to one transporting hazardous industrial waste. In fact, defendants Franklin and Zimmerman had answered the complaint without challenging the sufficiency of plaintiffs' complaint. In conclusion, dismissal of the state claims with prejudice was an improper exercise of jurisdiction by the district court.

Improper Consideration of Extraneous Materials in Ruling on a Motion to Dismiss

This Court has held that when matters outside the pleadings are presented and not excluded by the court, then the court is required by Rule 12(b) of the Federal Rules of Civil Procedure to treat a

motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. Carter v. Stanton, 405 U.S. 669, 671 (1971). The Fifth Circuit has likewise held that when a district court states that it has "reviewed the record" in ruling on a dismissal under Rule 12(b)(6), the motion to dismiss must be treated as a motion for summary judgment, and the proceedings must comport with the hearing and notice requirements of Rule 56(c). Partridge v. Two Unknown Police Officers, 751 F.2d 1448, 1451 (5th Cir. 1985). See also, Kopec v. Coughlin, 922 F.2d 152 (2nd Cir. 1991) (holding that Rule 12(b) does not vest in the district court the authority to consider matters outside the pleadings and summarily to designate them "uncontroverted"); LaBounty v. Adler, 933 F.2d 121 (2nd Cir. 1991); and Fonte v. Board of Mgrs. of Continental Towers Condo., 848 F.2d 24 (2nd Cir. 1988).

In the present case the district court noted several times, in ruling on Waste's motion to dismiss, that it had reviewed the extensive written materials submitted by Waste. (See transcript of Nov. 25, 1991 telephone conference.) The court opined: "Having cut through all of the felgergarb, it becomes more than apparent to this court that the Bowmans are displeased because they are unable, at least at the moment, to sell their property unless they go about developing it themselves; and in that event they will be obliged to pay the trunk sewer assessment." (Id., at p. 29). Clearly the court deviated from its duty to consider only the pleadings in ruling on a motion to dismiss and to construe the facts alleged in the complaint favorably to the pleader. When a federal court reviews the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail but whether he is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). See also, Neitzke v. Williams, 490 U.S. 319 (1988) (Rule 12(b)(6) dismissal improper based on judge's disbelief).

Petitioners maintain that the complaint adequately states a claim against all defendants based on the deliberate indifference of Franklin in hiring Zimmerman, who also contracted with Waste, as to the constitutional rights of Franklin's citizens, such as might subject Franklin to liability under 42 U.S.C., sects. 1983 and 1985. See, Walker v. City of New York, 974 F.2d 293 (2nd Cir. 1992). Franklin and Zimmerman had answered the complaint and Zimmerman had recently filed a motion for summary judgment.

Improper Sua Sponte Dismissal of Claims against Other Defendants

Defendants Zimmerman and Franklin had both answered the complaint and Zimmerman had recently filed a motion for summary judgment when the district court sua sponte dismissed petitioners' claims against all defendants in telephone conference on Waste's motion to dismiss. Petitioners had received no notice that the court would dismiss the complaint as to Franklin and Zimmerman and the conference hearing was held only as to Waste's motion to dismiss. Both the First and Second Circuits have held that a sua sponte dismissal without notice is improper and that the plaintiff must be given an opportunity to be heard. Thomas v. Scully, 943 F.2d 259 (2nd Cir. 1991); Fredyma v. AT & T Network Systems, Inc., 935 F.2d 368 (lst Cir. 1991). No cases were found where the court dismissed a complaint sua sponte after defendants had answered the complaint. Clearly where both Franklin and Zimmerman had filed answers to the complaint, even the defendants did not dispute the adequacy of the complaint. Petitioners maintain that the district court's dismissal sua sponte as to Franklin and Zimmerman, without notice, was legally improper .

This Court should grant certiorari here to explicitly rule that Federal courts should decline to exercise jurisdiction over state

claims after Federal claims have been dismissed before trial, to resolve the conflict between the Circuits created by the Seventh Circuit's decision in this matter, and to further rule that the failure to convert a motion to dismiss to a motion for summary judgment when extraneous matters were considered and the sua sponte dismissals of Franklin and Zimmerman were erroneous in this instance.

Jurisdiction Over Validity of Assessment Is Granted to State Court Exclusively

Section 66.60 (12) Wisconsin Statutes grants jurisdiction exclusively to state circuit courts. This is the only remedy petitioners have to correct illegality of the assessments. Section 66.60 (12)(e)

In federal court, petitioners sued for damages, which are not granted under state law. (Complaint, Exhibit 15)

The Federal District Court ruled that the secret assessment was valid, and would have to be paid.

The Court of Appeals appears to rule that the secret assessment was not made, but could become a lien ander section 66.6 (15) Wisconsin Statutes. It then affirmed the District Court judgement.

Petitioners pray that the validity of the $51,000.00 secret assessment be left to the state courts, and that damages for taking property without regard for notice, hearing and due process be assessed by federal courts.

The Easement and the Assessment

The City installed a private sewer for Waste's exclusive use. It was not public sanitary sewer described in an easement signed by only one of the two owners. (Complaint, p.10; Exhibit 17) The former mayor of Franklin admitted that the second owner refused to

sign the easement.

The secret assessment was for a private sewer to carry Waste's toxic leachate through plaintiff's farm.

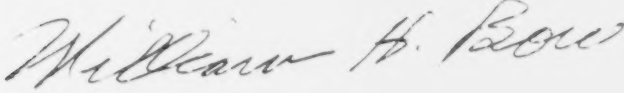
Contrary to the terms of the easement, it was secretly assessed against petitioners without prior notice or hearing.

If the owners of an easement "exceeds his rights either in the manner or in the intent of its use, he becomes a trespasser to the extent of the unauthorized use." 25 American Jurisprudence 2d, Easements, p. 74, p.479 (1966)

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Dated April 1, 1993
Respectfully Submitted



William H. Bowman
Cousel for the Petitioners
410 Church Road # 41
Ojai, CA 93023
(805) 646-4089

Loretta BOWMAN, William H. Bowman, William H. Bowman, Jr., et al., Plaintiffs-Appellants,

v.

CITY OF FRANKLIN, J.C. Zimmerman Engineering Corporation, Waste Management of Wisconsin, Incorporated, et al., Defendant-Appellees.

No. 91-3887.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 20, 1992.
Decided Dec. 2, 1992.
Rehearing Denied Jan. 4, 1993.

Property owners brought civil rights action against city landfill operator, and engineer who consulted on installation of sewer line running through owners' property. The United States District Court for the Eastern District of Wisconsin, J.P. Stadtmueller, J., dismissed action. Property owners appealed. The Court of Appeals, Eschbach, Senior Circuit Judge, held that property owners failed to state cause of action under § 1983 or for civil rights conspiracy .

Affirmed.

1. Federal Courts 776

Court of Appeals reviews de novo a motion to dismiss for failure to state a claim and affirms such dismissals only if plaintiff has failed to allege any set of facts upon which relief may be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Courts 794

In reviewing ruling on motion to dismiss for failure to state a claim, Court of Appeals takes as true all well-pleaded factual allegations and all reasonable inferences which may be drawn from those factual allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

APPENDIX A

3. Civil Rights 234

To state § 1983 cause of action, plaintiffs must allege that they were deprived of right secured by Constitution or laws of United States and that deprivation was visited upon them by a person acting under color of state law. 42 U.S.C.A. § 1983.

4. Civil Rights 198(4)

Landfill operator and consulting engineer on project involving installation of sewer line were not proper defendants in § 1983 action brought by owners of property through which portion of sewer line ran; both were private parties and property owners failed to establish that operator and engineer acted in conspiracy with state defendants. 42 U.S.C.A. § 1983.

5. **Civil Rights** ~236

For a § 1983 complaint to state cause of action against private defendants on ground that they acted in conspiracy with state defendants, complaint must contain more than mere conclusory allegations of conspiracy; factual basis for allegations must be provided. 42 U.S.C.A. § 1983.

6. Civil Rights 235(1)

Property owners failed to state § 1983 cause of action aga;nst city based on alleged illegal tax assessments in the absence of any allegation that taxes were imposed either in discriminatory manner or contrary to procedures provided by Wisconsin law. 42 U.S.C.A. § 1983.

7. Federal Courts 13.10

Property owners' § 1983 claim regarding alleged pollution of their property due to city having sewer line run through their property was not ripe; property owners alleged no actual injury. 42 U.S.C.A. § 1983.

8. Conspiracy 18

To state claim for civil rights conspiracy, complaint must allege conspiracy for purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of laws or of equal

privileges and immunities under laws and act in furtherance of conspiracy whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. 42 U.S.C.A. § 1985(3).

9. Conspiracy 7.5

To assert requisite animus for civil rights conspiracy claim, plaintiffs must be able to identify a class with common characteristics that raises inference that they might be protected by civil rights conspiracy statute. 42 U.S.C.A. § 1985(3).

10. Conspiracy 18

Property owners failed to state civil rights conspiracy claim based on installation of sewer line through their property in the absence of allegation that they were part of a class that shared any common racial or other class-based characteristics. 42 U.S.C.A. § 1985(3).

11. Federal Courts 18

Generally, when all federal claims are dismissed before trial, district court should relinquish jurisdiction over any pendent state claims as well.

12. Federal Courts 18

District court did not abuse its discretion when, after it dismissed federal civil rights claims, it found that property owners' pendent state law claims based on installation of sewer line through their property were without merit and had to be dismissed; property owners' easement indenture granted temporary easement for installation of sewer and property owners cited no authority for proposition that wastes flowing through sewer under property would constitute trespass.

13. Federal Civil Procedure 2839

To award sanctions under circuit rule, Court of Appeals must determine that appeal is frivolous and sanctions are appropriate. U.S.Ct. of App. 7th Cir.Rule 38, 28 U.S.C.A.

14. Federal Civil Procedure 2842

Sanctions would not be imposed under local circuit rule on property owners for appealing order dismissing their civil rights and state law action for failure to state a claim; property owners did not display bad faith in appeal, but rather, made serious attempt to address legal and factual errors that they believed district court made. U.S.Ct. of App. 7th Cir.Rule 38, 28 U.S.C.A.

Steve Enich, Charles H. Johnson, Milwaukee, Wis., for plaintiffs-appellants.

Jesse A. Wesolowski (argued), Franklin, Wis., for City of Franklin.

James L. Kirschnik, Patrick R. Burns, Machulak & Hutchinson, Brookfield, Wis., for J.C. Zimmerman Engineering.

Cordelia S. Munroe (argued), David S. Branch, Friebert, Finerty & St. John, Milwaukee, Wis., for Waste Management of Wisconsin Inc., and Waste Management of North America, Inc.

Before BAUER, Chief Judge, POSNER, Circuit Judge, and ESCHBACH, Senior
Circuit Judge.

ESCHBACH, Senior Circuit Judge.

The Bowmans, Plaintiffs-Appellants, brought this action under 42 U.S.C. §§ 1983 and 1985 against the City of Franklin ("Franklin"), J.C. Zimmerman Engineering Corp. ("Zimmerman"), Waste Management of Wisconsin, Inc. and its parent company, Waste Management of North America, Inc. (collectively, "Waste") seeking injunctive and monetary relief for purported violations of their civil rights as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. The factual basis of the suit is the installation of a sewer line, a portion of which runs through the Bowmans' property, and the recording of assessments related to that installation. The Bowmans asserted that the sewer line and the assessments were the product of a conspiracy among the defendants to interfere with their property rights by imposing illegal

taxes on the Bowmans, polluting the Bowmans' property and taking the property for the private use and benefit of Waste. In addition to the federal counts, the Bowmans included pendent claims, presumably under Wisconsin tort law, alleging both trespass and an interference with prospective purchasers of their property. The district court dismissed all counts of the Bowmans' complaint as to all defendants pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. We have jurisdiction over the appeal of this final disposition pursuant to 28 U.S.C. § 1291. We affirm. We also deny defendants' request for sanctions under Fed.R.App.P. 38 and Circuit Rule 38.

I.

First, we review the history of the defendants' association with each other because the Bowmans attempt to use this history to allege a conspiracy among the defendants. Franklin embarked on a series of civic improvements that resulted in their retention of Zimmerman as consulting engineer on the installation of Franklin's Central City Sewer (the "CCS"), which would ultimately connect with the Milwaukee Metropolitan Sewerage District (the "MMSD").

Waste formally requested that Franklin connect Waste's Metro Landfill, located in Franklin, to the CCS as an alternative method of transporting leachate produced in the landfill to the MMSD. Waste had been trucking the leachate to a MMSD treatment plant at relatively high cost. At roughly the same time, Waste, with Franklin's knowledge, retained Zimmerman as its project engineer to construct the force main necessary to connect to the CCS. Waste agreed to pay for modifications to the CCS necessary to accommodate Waste's use. Waste also agreed to construct the force main at its own expense and "dedicate ownership" of it to Franklin. Finally, Waste agreed to pay a connection fee of $600,000.00 and a continuing annual fee of $120,000.00 to Franklin's general operating fund, which would be used to reduce future property tax assessments.

The Bowmans' involvement with the CCS project began when William H. Bowman granted an easement to Franklin for the construction of a sanitary sewer through the Bowmans' property.

The easement indenture states: "[n]o special assessments shall be levied against subject property for any sanitary sewer and appurtenances erected on said easement." R. 30 at Ex. A.

A report on special assessments prepared by Zimmerman included an assessment of $89,321.09 for the CCS in the public right of way abutting the Bowmans' property. R. 27 at Ex. B. The Bowmans appealed this $89,321.09 assessment to the Milwaukee County Circuit Court, which determined that there had been an error in computation and annulled the assessment. By resolution, Franklin reenacted the assessment, reducing it to $82,407.59. R. 1 at Ex. 12. A second $51,187.00 assessment for the CCS on the Bowman property was recorded by Franklin, but was never charged to the Bowmans pursuant to the term of the easement indenture. R. 1 at Ex. 6. Because it was never billed, the Bowmans refer to this second assessment as a "secret" assessment.

The Bowmans then filed a complaint in federal district court, the dismissal of which is the subject of this appeal. In response to the Bowmans' complaint, Waste moved to dismiss all claims against them for failure to state a claim on which relief can be granted under Fed.R.Civ.P. 12(b)(6). Both of the remaining defendants, Franklin and Zimmerman, answered the complaint. In addition to filing its answer, Zimmerman moved for summary judgment pursuant to Fed.R.Civ.P. 56 and for sanctions pursuant to Fed.R.Civ.P. 11 or, in the alternative, attorney's fees pursuant to 42 U.S.C. § 1988.

At a hearing on Waste's motion to dismiss, the district court granted the motion, dismissing with prejudice. On its own motion, the district court also dismissed the Bowmans' complaint with prejudice as to Franklin and Zimmerman. Finally, the district court denied Zimmerman's alternative motions for sanctions and attorney's fees. In this appeal, the Bowmans challenge the dismissals. Zimmerman has not challenged the denial of its motion for sanctions and attorney's fees by the lower court, although all defendants have requested that sanctions be imposed by this Court under Fed.R.App.P. 38 and Circuit Rule 38. Lastly, the Bowmans attempted to place additional evidence before us shortly before oral

argument. Defendant Waste made a motion to strike this evidence, which we are hereby granting.1

II.

[1, 2] We review dismissals under Rule 12(b)(6) *de novo*, *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir.1990), and we affirm such dismissals "only if the plaintiff has failed to allege any set of facts upon which relief may be granted." *Yeksigian v. Nappi*, 900 F.2d 101,102 (7th Cir.1990). In undertaking such a review, we take as true all well-pleaded factual allegations and all reasonable inferences which may be drawn from those factual allegations. *Leahy v. Board of Trustees of Community College District No. 508*, 912 F.2d 917 (7th Cir.1990). Mindful of these standards, we address each legal basis for federal relief asserted by the Bowmans separately.

A. *Section 1983*

[3] It appears from their *pro se* pleadings that the Bowmans have alleged various violations of their property rights, presumably under the Fifth and Fourteenth Amendments, which they claim are actionable under 42 U.S.C. § 1983.2 To state a claim under § 1983, the Bowmans must allege: (1) that they were deprived of a right secured by the Constitution or laws of the United States, and (2) that the deprivation was visited upon them by a person acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980). All of the Bowmans' claims suffer from fatal weaknesses under one of the above prongs; many fail under both prongs.

[4,5] Examining first the state action requirement of a § 1983 claim, we note that Waste and Zimmerman are private parties, not state actors. As such they may be subject to liability under § 1983 only if they wilfully participate in a conspiracy with the state or one of its agents. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336,1352 (7th Cir.1985). A complaint must contain more than mere conclusory allegations of such a conspiracy; a factual basis for such allegations must be provided. *Leahy*, 912 F.2d at 922. The facts that the Bowmans do provide are insufficient to establish a conspiracy at

all, much less a conspiracy that aims to deprive the Bowmans of their constitutional rights.

For example, Waste's agreement with Franklin to connect to the CCS did not have any impact on the actions Franklin took with regard to the Bowmans. It did not alter the route that the sewer was to take through the Bowmans' property or the extent of the easement. Franklin's sole accommodation of Waste was the provision of an additional lining, which was done entirely at Waste's expense, thus having no effect on the assessments against the Bowmans' property. Similarly, Franklin's relationship with Zimmerman did not affect its actions toward the Bowmans, despite the fact that Zimmerman did much of the design work for the sewer and prepared the reports that Franklin used in determining the amount of the assessments. The mere fact that Zimmerman acted as consulting engineers on this project is insufficient to establish state action as "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S.Ct. 2764, 2771, 73 L.Ed.2d 418 (1982). Therefore, Waste and Zimmerman are not proper § 1983 defendants.

Franklin acted pursuant to Wisconsin Statute § 66.60 in assessing the Bowmans for the sewer. Accepting as true the allegation that this assessment qualifies as state action to state a claim under § 1983, the Bowmans must additionally allege that defendants' conduct deprived them of a right secured by the Constitution or laws of the United States. *Gomez*, 446 U.S. at 640, 100 S.Ct. at 1923. The Bowmans conclude in their complaint that their property rights have been violated, presumably under the Fifth and Fourteenth Amendments, but they do not allege how this has occurred. The specific conclusions that we can glean from the Bowmans' complaint are that the defendants have interfered with the Bowmans' property rights by imposing illegal taxes, polluting their property and taking the property for the private use and benefit of Waste, but none of these conclusions are supported by facts that make them cognizable Constitutional claims.

[6,7] First, regarding the illegality of the tax assessments, the Bowmans do not allege that the taxes were imposed either in a discriminatory manner or contrary to the procedures provided by Wisconsin law. Thus, the Bowmans cannot state a § 1983 claim arising from these facts under the equal protection or the due process clauses of the U.S. Constitution.[3] *See Kasper u Larson,* 372 F.Supp. 881 (E.D.Wis.1974). Second, the alleged pollution of the Bowmans' property is speculative at present. The Bowmans have alleged no actual injury. As such, this cannot be the source of a ripe claim for damages under § 1983. Finally, the Bowmans' contention that their property was taken through a conspiracy for the private use and benefit of Waste is contrary to the facts contained in the documents attached to the Bowmans' complaint. Neither the use of their land nor the amount of their assessments has been altered by Waste's involvement, and Waste has and will continue to pay for their use of the CCS. For these reasons, none of the Bowmans' allegations make out a claim under 42 U.S.C. § 1983.

B. *Section 1985*

[8] The Bowmans also attempt to state a claim under 42 U.S.C. § 1985. Though they do not specify which subsection is applicable, only subsection (3) is at all related to the Bowmans' allegations.[4] To state a claim under § 1985(3), a complaint must allege:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott,* 463 U.S. 825, 828-29,103 S.Ct. 3352, 3355-56, 77 L.Ed.2d 1049 (1983), citing *Griffin v. Breckenridge,* 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-99, 29 L.Ed.2d 338 (1971). The *Griffin* Court specifically stated that the second element required "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," though it did not decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be

actionable" under § 1985(3). 403 U.S. at 102 & n. 9, 91 S.Ct. at 1798 & n. 9.

[9,10] In order to assert the requisite animus, plaintiffs must be able to identify a class with common characteristics that raises the inference that they might be protected under § 1985(3). The Bowmans allege that they are part of a "trunk sewer class," but they do not allege that this class shares any common racial or other class-based characteristics.[5] The most that the Bowmans could assert is that they are linked to the remainder of the class by ownership of land in the same geographic area. However, § 1985(3) does not reach bias based on economic status.[6] *Scott*, 463 U.S. at 83738, 103 S.Ct. at 3360-61. Even if the defendants' actions against the Bowmans could somehow be viewed as political, "§ 1985(3) does not reach nonracial political conspiracies." *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir.1985). Therefore, because the Bowmans have failed to allege racially-motivated discriminatory animus behind defendants' conduct, their § 1985(3) claim must be dismissed.

C. State Claims

[11,12] The Bowmans alleged two state claims in their complaint: (1) that the installation of the sewer and the flow of Waste's leachate through it amounts to an ongoing trespass on their property and (2) that defendants' actions have caused prospective purchasers to lose interest in the property. Generally, when all the federal claims are dismissed before trial, the district court should relinquish jurisdiction over any pendent state claims as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Instead of relinquishing jurisdiction by dismissing without prejudice, however, Judge Stadtmueller made a determination on the merits by dismissing *both* the federal and state claims with prejudice. This action represents a recognized exception to the general rule stated above: "[I]f it is absolutely clear that the pendent claim[s] can be decided in only one way, the district judge can and should decide [them], to save the time of the state court." *Martin-Trigona v. Champion Federal Sav. & Loan Ass 'n*, 892 F.2d

575, 578 (7th Cir. 1989). *Martin-Trigona* indicates that we review such a determination under an "abuse of discretion" standard. *Id.* Judge Stadtmueller did not abuse his discretion by finding that the Bowmans' pendent state claims could be decided in only one way, because they are without merit. First, the Bowmans' easement indenture grants a temporary easement for the installation of the sewer. R. 30 at Ex. A. Second, the Bowmans cite no authority for the untenable proposition that wastes flowing through a sewer under a person's property constitutes a trespass. Finally, we cannot identify any known claim for relief under Wisconsin law that will support the Bowmans' interference claim. For these reasons, we find that Judge Stadtmueller was correct to dismiss the Bowmans' state claims with prejudice.

D. Sanctions

[13,14] The defendants have requested that sanctions be entered against the Bowmans under Fed.R.App.P. 38 and Circuit Rule 38. To award Rule 38 sanctions, we must determine that (1) the appeal is frivolous and (2) sanctions are appropriate. A*Abart Elec. Supply Inc. v. Emerson Elec. Co.*, 956 F.2d 1399, 1406 (7th Cir.1992). Though the question of whether this appeal is frivolous is a very close one, even taking note of William Bowman's *pro se* status, we do not find that sanctions are appropriate in this case. In making the determination of whether sanctions are appropriate, "[t]ypically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or out of sheer obstinacy." *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir.1983). The Bowmans have not displayed bad faith in this appeal, but rather have made a serious, though unpersuasive, attempt to address legal and factual errors that they believed the district court made, in contrast to *pro se* appellants who have been sanctioned in the past. *See, e.g., Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir.1986); *Bacon v. American Federation of State, etc.*, # 13, 795 F.2d 33, 35 (7th Cir.1986). For this reason, we deny the request for the sanctions under Fed.R.App.P. 38 and Circuit Rule 38.

1. By letter pursuant to Fed.R.App.P. 28(j) and circuit Rule 28(j), the Bowmans submitted two reports one from the District Attoney of San Diego, California and one from the Sheriffs Department of Ventura County, California. These documents were never presented to the district court. Waste filed a motion to strike these documents. sy order of this Court, the submission and subsequent motion were submined to the merits panel for determination. Fed.R.App.P. 28(j) and circuit Rule 28(j) deal only wilh citation of supplemental *authority.* since these reports constitute additional evidence and not authority they are not properly

submitted under these rules. See *Trans-Sterling, Inc. v. Bible,* 804 F.2d 525, 528 (9th Cir. 1986). Therefore, we grant the motion to strike.

2. Section 1983 imposes civil liability only upon persons who "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws...." 42 U.S.C. 1983.

3. In addition, though the district court did not rely on it, the Tax Injunction Act limits the power of the district court to restrain state officers from collecting taxes where an adequate remedy is afforded the taxpayer under state law. 28 U.S.C. 1341. Such remedies exist in this case. In fact, the Bowmans made use of these remedics to challcnge the $89,312.09 assessmcnt in a Wisconsin state court, which annulled the assessment as improperly calculated. Because the "secret" assessment has never been billed, no ripe claim can be made relating to it. Howevcr, because of the cumbersome way that Franklin rccorded thc assessmcnt, it could amount to a lien on thc property, impairing markctability. As pointed out in oral argument, the proper method for dealing with that potential problem would be a quiet title action. conclusions are supported by facts that make them cognizable Constitutional claims.

Because the Bowmans did not assert this lien theory anywhere in their complaint, it is not directly before us in this appeal.

4. Subsection (1) is inappropriate in this case because il applies only to conspiracies to prevent federal officers from performing their duties. No failure to carry out duties on the part of a federal officer is alleged by the Bowmans. Subsection (2) is similarly

inappropriate because it applies only to conspiracies to obstruct justice by intimidating a party, witness or juror. The Bowmans allege no such intimidation. Therefore, subsection (3) remains as the most likely basis for the Bowmans' claim because it provides that damages may be recovered by those injured by a conspiracy to deprive persons of equal protection or of equal privileges and immunities under the laws. 42 U.S.C. 1985(3)

5. Their situation bears some resemblance to that of *Askew v. Bloemker* in which "status as a 'class' of victims depends entirely upon the defendants' actions, and it is not possible for defendants to have conspired to discriminate againSt a class that did not even exist until after they had acted." 548 F.2d 673, 678 (7th Cir. 1976).

6. The Scott Court, concerned that "[s]uch a con struction would extend § 1985(3) into the economic life of the country in a way that we doubt that the 1871 Congress would have intended ..." refused to "construe § 1985(3) to reach conspiracies motivated by economic or commercial animus," in that case activity by a union against a company that had hired non-union workers. *Id.*, 463 U.S. at 837-38, 103 S.Ct. at 3360-61 .

III.

For the foregoing reasons, the judgment of the district court dismissing the Bowmans' claims with prejudice as to all defendants is AFFIRMED and the MOTION FOR SANCTIONS IS DENIED.

United States District Court

Eastern District of Wisconsin

Loretta Bowman and
William H. Bowman,
William H. Bowman, Jr.,
Thomas Bowman, Susan Bowman,
John Bowman and Joseph Bowman,

Plaintiffs,

vs. Civil No. 91-C-829

City of Franklin,
J.C. Zimmerman Engineering Corp.,
Waste Management of North America,
Inc., and Waste Management of
Wiscon sin, Inc.,

Defendants.

TRANSCRIPT OF CONFERNCE CALL ON
MOTIONS TO DISMISS
(Including only opinion of court pp. 19-33)

Record made in the above-entitled matter before the

Honorable J. P. Stadtmeuller, Judge of said Court on

November 25, 1991, commencing at 9:33a.m.

Well, as I indicated at the outset, the court has reviewed the written materials that have been submitted by Waste Management of Wisconsin and the parent, Waste Management of North America; and I believe your comments this morning have been helpful in the

and I believe your comments this morning have been helpful in the court's addressing the merits of the motion.

The following constitutes my decision with regard to the motion; and at the conclusion of my remarks I will simply direct the prevailing party to submit a short order for the court referencing this morning's hearing as well as the written materials that the court has had an opportunity to consider with regard to the motion to dismiss.

By way of factual background, it appears from the written submissions as well as cousel's comments that Waste Management owns and operates a landfill in the City of Franklin. Because the current site is expected to reach capacity in a period of time, less than ten years, Waste Mangement has begun making arrangements to expand this landfill site.

One of Waste Management's concerns relates to the disposal of leachate. The current site appearently produces some 50,000 gallons of leachate a day; and in order to dispose of this leachate , Waste Management trucks it from the landfill site to a Milwaukee Metropolitan Sewerage District treatment plant. Expanding the landfill obviously will result in more leachate and commensurate higher trucking costs. To avoid these costs, Waste Management enlisted the aid of the City of Franklin and its consulting engineer, J.C. Zimmerman Engineering Corporation, to develop an alternative to connect the landfill to the Milwaukee Metropolitan Sewerage District.

The City of Franklin prior to being approached by Waste Management had already embarked on a comprehensive sewer plan for the City commonly referred to as the Central City Sewer which would also connect with the Milwaukee Metropolitan Sewerage District. Once that Central City Sewer project had been completed, Waste Management's approach would be to construct a force main which would allow the leachate to be transported through the sewer flow from the landfill to the Central City Sewer.

In August of 1988 Waste Management formally requested the City of Franklin to connect its landfill to the proposed Central City Sewer. At the same time, it informed the City that it had hired J.C. Zimmerman Engineering Corporation as its project engineer. On November 3rd of 1988 J.C. Zimmerman submitted to the City of Franklin a "Report on Special Assessments" detailing the cost of teh

Central City Sewer and anticipated property assessments.

The report pointed out both that the Central City Sewer would have to be redesigned to accomodate industrial waste and that Waste Management was prepared to pick up the tab for the additional costs associated with these modifications. It is also noted that the property owners who have granted sewer easements such as the Bowmans would not be assessed for the sewers installed on their easement until a city street is built on the easement or the sewer becomes a local sewer in a planned development.

On November 28th of 1988 the City held a public hearing on the proposed Central City Sewer. At that hearing the City distributed a flier disclosing, first, that Waste Management had requested that the landfill be connected to the Central City Sewer; second, that Waste Management would pay the cost of lining the Central City Sewer to accommodate the flows from the landfill; and, third, that the City would charge Waste Management a sizable connection fee which would be used to reduce future property tax assessments.

On December 6th the Franklin Common Council authorized the construction of the Central City Sewer and at the same time levied assessments to cover the costs associated with the construction. In addition, the Council also approved a contract with Waste Management calling for a $600,000.00 payment to the City's general fund as a fee to hook up the lateral from the dump site or landfill site to the Central City Sewer.

Thereafter, the plaintiffs in this case, the Bowmans, were assessed some $89,312.09 for the installation of the Central City Sewer abutting their property; and at the same time the City recorded but did not bill a second assessment of $51,187.00 for a sewer laid in the easement across their property.

As I noted earlier, the trunk sewer assessment is a deferred assessment; that is, the plaintiffs will not be billed for this assessment until they or a future owner derive some benefit from the sewer. And for that to occur based upon the court's review of the parties' written submissions, one of two things must occur; that is, either a public street has to be built on the easement or the sewer has to accommodate the development of two or more properties located within the easement tract.

With regard to the $89,000 assessment, I would note

parenthetically that that assessment was reduced to $82,407.59 after the Bowmans challenged the assessment in a state court proceeding and the court determined that an error was made in the computation and annulled the assessment which was recomputed.

In filing their action, the Bowmans contend that they were neither given notice of the trunk assessment nor told that the trunk sewers may be used to carry hazardous waste from the landfill. They contend that the City of Franklin "bartered its police power" to Waste Management in return for a $600,000 connection fee and an agreement to indemnify the City for any damages and a free forced main connecting the landfill to the Central City Sewer. They also assert that the sewer easement across their property was not valid because it was not signed by all of the property owners. As a prelude to this action the Bowmans served the City of Franklin with a claim for damages in February of 1991. Since no response was forthcoming to their claim, the claim is deemed to have been denied.

With regard to the standard appropriate to a motion to dismiss, I find that the Seventh Circuit's comments in Gibson v. City of Chicago at 910 F.2d 1510 at page 1520, Seventh Circuit case from 1990, quoting Triad Associates v. Chicago Housing Authority, 892 F.2d 583 at page 586, the Seventh Circuit case from 1989, and I quote, "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." The allegations of the complaint and any reasonable inferences that can be drawn from them must be taken as true, citing Hishon v. King & Spauldina, 467 U.S. 69 at page 73, a 1984 U.S. Supreme Court case.

Dismissal under Rule 12(b)(6) is appropriate "only if the plaintiff has failed to allege any set of facts upon which relief may be granted," citing Yeksigian v. Nappi, 900 F.2d 101 at page 102, again a Seventh Circuit case from 1990.

Although in their complaint the Bowmans do not specify which provision of section 1985 Waste Management has purportedly violated, given the violations in their complaint, I find that it is most likely section 1985(3); noting that section 1985(1) renders actionable a conspiracy to interfere with the duties of federal officers, section 1985(2) a conspiracy to impede justice, and, finally, section 1985(3) a conspiracy to deprive a person or class of persons of equal protection.

To state a claim under section 1985(3), a plaintiff must allege, first, a conspiracy; second, for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws; and, three, an act in furtherance of the conspiracy; and, finally, fourth, whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States, citing United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825 at pages 828 and 829, 1983 U.S. Supreme Court case.

As I view plaintiffs' allegations with regard to their claim under section 1985, I find a problem in their meeting the requirement with regard to the second element; that is, the protected class. The Bowmans contend that they are members of a class consisting of the owners of eight farms wrongfully assessed for construction of the trunk sewer. Obviously, "wrongfully assessed farm owners" do not constitute a protected class under section 1985(3).

Recent decisions from the U.S. Supreme Court and the Seventh Circuit make it more than clear that section 1985(3) does not reach conspiracies motivated by economic or commercial concerns, citing Scott at page 838, or by one's political views, citing Grimes v. Smith, 776 F.2d 1359 at 1366, a Seventh Circuit case from 1985.

Rather, this statute applies solely to conspiracies motivated by race or some other class-based animus, again citing Scott, 463 U.S. at 836 and 837, Grimes at 776 F.2d at 1366. I also note Griffin v. Breckenridge, 403 U.S. 88 at page 102, 1971, as well as Tomkins v. Tinley Park, 566 F.Supp. 70, it's a case from the Northern District of Illinois in 1983 in which the court found that a conspiracy between a municipality to the detriment of adjoining property owners does not state a claim under section 1985.

In my view since the Bowmans have not and, more importantly, cannot allege any racial or class-based discrimination, their 1985 claim against Waste Management must be dismissed.

The next question relates to whether or not the court ought also dismiss the section 1985 claims against the City of Franklin as well as J.C. Zimmerman Engineering Corporation. Although sua sponte dismissals without prior notice and an opportunity to be heard are generally frowned upon, citing Tamari v. Bache & Company,

(Lebanon) S.A.L., 565 F.2d 1194 at page 1198, Seventh Circuit 1977, cert. denied, 435 U.S. 905, 1978, the Seventh Circuit has acknowledged and indeed been willing to permit such dismissals 'so long as a sufficient basis for the court's action is apparent from the plaintiff s pleading,' citing Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411 at page 414, Seventh Circuit case from 1986.

The court's reasoning is that "the proper administration of justice requires that a trial judge have substantial control over the proceedings before him," again citing Doe, 788 F.2d at 415, quoting from Flora v. Home Federal Savings & Loan Association, 685 F.2d 209 at page 212, again a Seventh Circuit case from 1982.

As I've already indicated, based upon the court's review of the extensive written submissions by Waste Management and the Bowmans on the motion to dismiss, I conclude that the Bowmans cannot state a claim under any circumstances relating to the factual underpinnings of this case under section 1985.

It is also my view that they have indeed been given notice and an opportunity to be heard on the general matter of dismissal of their 1985 claim, and I am left with no other conclusion than this cause of action under 1985 cannot stand as against the City of Franklin or J.C. Zimmerman Engineering Corporation. And, accordingly, I do herewith dismiss outright the 1985 claim as against the City of Franklin and J.C. Zimmerman Engineering Corporation.

Next, I want to turn to plaintiffs~ section 1983 claim. To state a claim under section 1983, a plaintiff must allege that, first, he was deprived of a federally protected right; second, by a person acting under color of state law, citing Gomez v. Toledo, 446 U.S. 635 at page 640, a 1980 U.S. Supreme Court case. Waste Management contends that the Bowmans' claims do not satisfy either prong.

Private persons generally do not act under color of state law. In certain situations, however, a private person will be subject to liability under section 1983. One of these is when a private individual willfully participates in a conspiracy with the state or one of its agents, citing Moore v. Market Place Restaurant, Incorporated, 754 F.2d 1336 at page 1352, Seventh Circuit case from 1985.

Establishing state action, however, requires the plaintiff to do more than just allege a conspiracy with a state agent, citing Leahy v. Board of Trustees of Community College District No. 508, 912 F.2d

917 at page 922, again a Seventh Circuit case from 1990. There must be some factual allegation suggesting a "meeting of the minds," that is, a mutual agreement among the defendants to deprive the plaintiff of his constitutional rights, citing Sparkman v. McFarland, 601 F.2d 261 at page 268, a Seventh Circuit per curiam opinion from 1979, Judge Sprecher having written a concurrence.

The Bowmans allege the defendants conspired to deprive them of the use and enjoyment of their land, arguably via violation of their property rights under the Fifth and Fourteenth Amendments. But even accepting these allegations as true, there is nothing that suggests that Waste Management conspired with the City to achieve that result.

All Waste Management did was request that its landfill be connected to the proposed Central City Sewer system, and Waste Management had nothing to do with the Central City Sewer system, nor the route of waste through that system. Likewise, I find it patently absurd for the plaintiffs in this case to suggest that Waste Management somehow conspired with the City to conceal the trunk sewer assessments or the fact that the Central City Sewer system would carry leachate from the landfill.

It is evident that Waste Management did not levy the assessments and played no role in their computation. Moreover, it is clear from the exhibits that have been submitted by the Bowmans in response to the motion to dismiss that the assessments and the nature of the waste produced by the landfill were disclosed both in the J.C. Zimmerman report, which was available for inspection, as well as the November 28th, 1988, public hearing.

Having cut through all of the felgergarb, it becomes more than apparent to this court that the Bowmans are displeased because they are unable, at least at the moment, to sell their property unless they go about developing it themselves; and in that event they will be obliged to pay the trunk sewer assessment. Suffice it to say, that in my view does not amount in any way to a constitutional violation under section 1983.

Finally, the Bowmans have two separate alleged state law claims, one dealing with trespass and the second their apparent inability to find a buyer for the property due to the pending assessment being billed if the property is developed. The Waste

Management defendants suggest that these state law claims must also be dismissed because there is no independent basis for federal jurisdiction, citing United Mine Workers v. Gibbs, 383 U.S. 715, which is a 1966 U.S. Supreme Court case.

The court based upon its review of the authorities submitted by the parties, first beginning with the trespass claim, I find that the Bowmans do not allege that the force main constructed at the request of Waste Management crosses their property, only that a trunk sewer is embodied under the easement.

In an attempt to salvage their argument with regard to these state-related claims, the Bowmans assert that Waste Management is trespassing by virtue of the fact that its leachate may flow through the trunk sewer. However, the Bowmans cite no legal authority for their position; and frankly, carried to its logical conclusion, it would mean that anyone who has waste running through a sewer would be considered in their view a trespasser. I find that argument to be less than ingenuous and find no basis to allow the state trespass claim to go forward.

Similarly, there is even less reason for the court to consider as viable their final claim with regard to their inability to sell the property because of the pendency of a potential assessment as amounting to a claim for relief under state law. Accordingly, I find no basis for these state law claims to go forward independent of the other claims that I have already dismissed.

One final note, the Bowmans also argue that the court has diversity jurisdiction and their claims in spite of the court's dismissal of the 1985 and 1983 claims ought to be allowed to go forward. However, there is a fatal flaw in the Bowmans' argument on this point, and that is the fact that one of the plaintiffs, Susan Bowman, and one of the defendants, Waste Management of North America, are both citizens of Illinois. Thus we do not have in this case complete diversity.

So based upon my ruling, Ms. Munroe, I would ask that you prepare an order for the court's signature dismissing your client as well as the City and J.C. Zimmerman as to the 1985 claims. The matter with regard to the 1983 claims I believe based on the record that has been made also ought be dismissed as asainst the City of Franklin as well as J.C. Zimmerman Engineering Corporation.

And since the entirety of this case is ripe for dismissal, I'm going to ask that you simply prepare an order including the 1983 claims against J.C. Zimmerman Engineering as well as the pending state claims and also reference the fact that the recently filed motion for summary judgment on behalf of J.C. Zimmerman Engineering, that is, the motion filed on November 12th, is denied as moot since I've already denied or granted on the court's own motion the functional equivalent of a motion for summary judgment by incorporating Waste Management's motions for dismissal which transcend the summary judgment motion.

Insofar as the motion for costs and attorneys' fees either under Rule 11 or section 1988, given the fact that the court had previously scheduled the hearing on the motion to dismiss back on September the 9th and the motion for summary judgment was not filed until November the 12th, I'm going to deny both the Rule 11 motion as well as the motion for costs and attorneys' fees filed under section 1988 by J.C. Zimmerman Engineering Corporation since they in my view have waited until the motion to dismiss was adjudicated by the court. There was no requirement or deadline for filing motions for summary judgment. And, finally, the motion to dismiss that I have granted is also without costs and without attorneys' fees.

So that constitutes the entirety of the court's decision; and, Ms. Munroe, you have the principal responsibility of preparing an appropriate order for the court's signature based on the hearing this morning. Thank you for all being available, and thank you for your written submissions. Court stands in recess.

(Proceedings concluded at 10:36 a.m.)

CERTIFICATE

I, Christine L. Petrie, Official Court Reporter, United States District Court, Eastern District of Wisconsin, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 6th day of December 1991.

Chistine L. Petrie, RPR-CM
Official Court Reporter

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 4, 1993

Before
Hon. Wiliam J. Bauer, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Jesse E. Eschbach, Senior Circuit Judge

LORETTA BOWMAN,
WILLIAM BOWMAN,
WILLIAM BOWMAN, JR.,
et al.,
Palintiffs-Appellants

v.

No. 91-3887
CITY OF FRANKLIN,
J.C. ZIMMERMAN ENGINNERING
CORPORATION, WASTE
MANAGEMENT OF WISCONSIN,
INCORPORATED, et al.,
Defendants-Appellants

ORDER

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 91-C-829

J.P. Stadtmueller, Judge.

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiffs-appellants, all of the judges on the panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

AMENDMENTS V & XIV
TO THE UNITED STATES CONSITUTION &
43 U.S.C. 1983 & 1985

AMENDMENT V

Criminal Proceedings and Condemnation of Property

[Section 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment on indictment of a grand jury, except in cases arising in the land or navel forces, or i the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeporady of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use withour just compensation.

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States; nor shall any stste deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C § 1983

Civil Action for Depreivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

privileges, or immunities secured by the Constitution and laws, shall be liable to the injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

42 U.S.C § 1985

Conspiracy to Interfere with Civil Rights

(1) Preventing Officer From Performing Duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his offical duties;

(2) Obstructing Justice, Intimidating Party, or Juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having attended or testified, or to influence the verdict, presentment, or indictment of nay grand or petit juror in any such court, or to injure such juror in his person or property on account of the verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hinderingm obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce,

the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving Persons of Rights or Privileges. If two romore persons in any State conspire for the purpose of depriving, either directly or indirectly, any person of the equal protection of the laws, or of equal privileges and immunities under the laws,; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to b e done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizrn of teh United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against anyone or more of the conspirators. (R. S. § 1980.)

WISCONSIN STATUTES
SECTIONS 66.60 (12) (a), 66.60 (12) (e), 66.60 (15)

66.60 (12) (a) "If any person having interst in any parcel of land affected by any determination of the governing body,...that person feels aggreived thereby (he) may, within 90 days after the date of the...publication of thre final resolution...appeal therefrom to the circuit court of the county in which shuch property is situated. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings...and shall transmit the same with the original or certified copies of all the papers in the matter to the clerk of the circuit court." (Emphasis supplied)

66.60 (12) (e) "An appeal under this subsection shall be the sole remedy of any person aggrieved by a determination of the governing body."

66.60 (15) "Every special assessment levied under this section shall be a lien on the property against which it is levied."

Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

No. 92-1608

In The

Supreme Court of the United States

October Term, 1992

LORETTA BOWMAN and WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN,

Petitioners,

v.

CITY OF FRANKLIN, J.C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC. and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JESSE A. WESOLOWSKI
(Counsel of Record)
131 West Layton Avenue
Suite 300
Milwaukee, Wisconsin 53207
(414) 483-9200
Attorney for Respondent, City of Franklin

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Respondent City of Franklin ("Franklin") objects to the form and substance of questions 1, 2, 3 and 6 of the "Questions Presented" on p.i of the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Petition") and believes the questions should be stated as follows:

1. Did the Seventh Circuit err in not concluding that the United States District Court for the Eastern District of Wisconsin abused its discretion in dismissing the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and not subjecting the matter to disposition as provided in Rule 56?

2. Did the Seventh Circuit err in not concluding that the United States District Court for the Eastern District of Wisconsin abused its discretion in its *sua sponte* dismissal of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure?

3. Has the Seventh Circuit rendered a decision in conflict with any decision of the Second Circuit Court of Appeals pertaining to a theory of municipal liability upon a deliberate indifference to constitutional rights?

6. Did the Seventh Circuit err in granting a motion to strike additional evidence submitted by petitioners shortly before oral argument on appeal?

PARTIES

Franklin does not object to the names of all parties as they appear in the caption of this case.

TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

INTRODUCTION 6

DISCUSSION 7

I. THE SEVENTH CIRCUIT PROPERLY DISMISSED THE STATE CLAIMS 7

II. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE 8

III. THE DISTRICT COURT'S *SUA SPONTE* DISMISSAL OF CLAIMS WAS PROPER 12

VI. PETITIONERS' DISCUSSION OF EXCLUSIVE STATE JURISDICTION AND THE EASEMENT AND ASSESSMENT DOES NOT PROVIDE SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Baker v. Director United States Parole Com., 916 F.2d 725 (App. DC 1990) 13

CIT Group v. Village of Germantown, 163 Wis. 2d 426, 471 N.W.2d 610 (Ct. App. 1991) 15

Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411 (7th Cir. 1986) 12

Flora v. Home Federal Savings & Loan Association, 685 F.2d 209 (7th Cir. 1982) 13

Gaff v. Federal Deposit Ins. Corp., 814 F.2d 311 (6th Cir. 1987) 7

Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990) 8

Grunwald v. Modern Wrecking Co., 18 Wis. 211, 118 N.W.2d 188 (1962) 17

Harder v. Maloney, 251 Wis. 233, 26 N.W.2d 830 (1947) 16

Hishon v. King & Spaulding, 467 U.S. 69 (1984) 8

Martin-Trigona v. Champion Federal Sav. & Loan Ass'n, 892 F.2d 575 (7th Cir. 1989) 8

Neitzke v. Williams, 492 U.S. 319, 109 S. Ct. 1827, 104 L.Ed.2d 338 (1989) 10, 11

Tamari v. Bache & Company, (Lebanon) S.A.L., 565 F.2d 1194 (7th Cir. 1985) *cert. denied*, 435 U.S. 905 (1978) 12

Trans Sterling, Inc. v. Bible, 804 F.2d 525 (9th Cir. 1986) 6

TABLE OF AUTHORITIES – Continued

Page

Triad Associates v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989) 8

United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966) 7

Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) 11

Yeksigian v. Nappi, 900 F.2d 101 (7th Cir. 1990) 9

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1915(d) 10

42 U.S.C. §1983 11

42 U.S.C. §1985(3) 3

OTHER AUTHORITIES

Fed. R. App. P. 28(j) 2, 5

Fed. R. Civ. P. 12(b)(6) ..... *passim*

Sup. Ct. R. 10 3

Sup. Ct. R. 14(g) 3

Wright & Miller, Federal Practice and Procedure: Civil 2d §1357, pp. 311-318 13

JURISDICTIONAL STATEMENT

Franklin does not object to the jurisdiction of this Court under 28 U.S.C. §1254(1), but does note that the Statement of the Case set forth in the Petition does not show the basis for federal jurisdiction in the court of first instance and further notes that the district court found a lack of complete diversity. (App. B at 8)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Franklin objects to the Statement of Constitutional and Statutory Provisions Involved (Petition at 2), in that the federal statues and constitutional provisions set forth therein are not addressed in nor related to the Questions Presented or the arguments set forth in the Petition. Further, the statement of Constitutional and Statutory Provisions Involved does not set forth the federal statutes and rules attempted to be applied in the Questions Presented.

The statutes and rules involved in this case are as follows:

Rule 12(b)(6) of the Federal Rules of Civil Procedure

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . . A motion

making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for the summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 28(j) of the Federal Rules of Appellate Procedure

(j) **Citation of Supplemental Authorities.** When pertinent and significant authorities come to the attention of a party after the party's brief has been filed or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

———♦———

STATEMENT OF THE CASE

Franklin objects to the Statement of the Case at pp. 2-7 of the Petition, upon the grounds that it is not concise as required by Sup. Ct. R. 14(g) and contains "facts" that are not supported by the record. Franklin further objects to the Statement of the Case upon the grounds that it also contains arguments, including arguments which are irrelevant to the considerations governing review on Writ of Certiorari pursuant to Sup. Ct. R. 10.

Franklin objects to the Statement of the Case, in that it contains substantial misstatements of fact and law as follows:

The original action was brought against four defendants, not three defendants. (Petition at 2) The Complaint did not specifically refer to 42 U.S.C. §1985(3). (*Id.* at 3; R.1) The statement that the District Court "reviewed extensive written materials submitted by Waste" is incomplete and misleading. (Petition at 2) The District Court stated that it reviewed "extensive written submissions by Waste Management and the Bowmans' on the motion to dismiss, . . . " (R. 31 at 27) The written submissions of Waste Management consisted of a notice of motion, motion and brief in support and did not include any affidavits or evidentiary materials. (R. 7 and 8)

Franklin objects to the statements at p. 4 of the Petition that: the "Seventh Circuit ignored the factual allegations in the complaint"; the Seventh Circuit failed to note "that the District Court did not convert the Rule 12(b)(6) motion to dismiss to a motion for summary judgment under Rule 56, as required by Rule 12"; and the "petitioners were thereby denied the opportunity to submit

any evidence in support of their claims", and Franklin objects to any inferences of error arising therefrom, as incorrect under the facts, the record and the law.

Franklin objects to the attempt at p. 4 of the Petition to raise a theory of municipal liability upon a deliberate indifference to constitutional rights, as this issue was not raised by petitioners in the courts below. Further, the statement that "Franklin's municipal indifference [sic] is shown in the signed contract between Franklin and Waste", coupled with the arguments attempting to support this statement, constitute *non sequitur.* (*Id.* at 4) The statement that the connection of the Waste Management sewer force main was to occur "through petitioner's land" is factually incorrect. (*Id.* at 4; R. 31 at 30) The conclusions reached at p. 5 of the Petition, upon petitioners' interpretation of a hold harmless provision and its perceived resulting effect upon the intent of the City of Franklin and all courts, are without any basis in fact or at law and are patently absurd.

Franklin is at a loss to determine the intent of the Petition in its discussion of the application of Wisconsin Statutes. (Petition at 5) The discussion notes that such statutes "give sole jurisdiction over the validity of assessments to the local circuit court". However, petitioner's complaint in this action prayed for a "permanent injunction against all Defendants prohibiting any attempt to tax the Plaintiffs' property". (R. 1 at 11) The inference of a "secret assessment" arising from the statement that "the only assessment they or the state circuit court new of" is not supported by the record. (Petition at 5; R. 31 at 29) The statement that "[n]o damages are provided in Wisconsin" is equally incorrect. (R. 31 at 5)

Franklin objects to all of the conclusions and arguments set forth under "The Easement and The Assessment" at pp. 5-6 of the Petition. Specifically and without limitation, Franklin objects to the statement that Franklin "used" the subject easement to "install a private sewer for waste management", as contrary to the facts and the record. (R. 31 at 30) The allegations of a "secret assessment" and the lack of any notice or hearing, are without any basis in fact or the record. (R. 31 at 29) The statement that petitioners were "secretly assessed an additional $51,000.00 for private sewer for Waste's exclusive use along the easement" now adds an additional contradiction to the contradictions already existing within the complaint. (R. 1 at 5 and Exh. 9) To state that "[a]lmost two years after the $51,000.00 sewer was installed on the petitioner's [sic] land, the secret assessment of $51,000.00 was discovered", upon the record in this matter, including those portions of the record cited in support of such statement of p. 5. of the Petition, is fantastic and delusional. The Petition refers to a letter in the record to support its statement that the "mayor admitted that the $51,000.00 assessment was made but deferred." (R. 1 at Exh. 14) The letter does not refer to an assessment against petitioners nor to the easement upon their property.

Franklin finally objects to the arguments set forth in the Statement of the Case at pp. 6-7 of the Petition, pertaining to "[t]wo reports . . . submitted to expand on allegations of conspirancy [sic] deprive petitioners of constitutional rights and property". The arguments are misplaced and misguided. The Seventh Circuit granted a motion to strike this evidence pursuant to Fed. R. App. P. 28(j) and circuit Rule 29(j), which deal only with the

citation of supplemental *authority*. Petitioners attempt to distinguish *Trans-Sterling, Inc. v. Bible*, 804 F. 2d 525 (9th Cir. 1986), in that the submission there consisted of newspaper reports, while the submission here consisted of "official" reports. (Petition at 7) The issue is whether the submission consisted of authority, not the level of trustworthiness or officiality of further evidence. Were a further inquiry into the substance of the submission warranted, it would bar the submission on hearsay and relevancy grounds.

SUMMARY OF ARGUMENT

The Petition should be denied because it presents questions for review upon factual allegations which are patently absurd and unsupported by the record, including the record made by Petitioners, and the questions of law attempted to be placed upon such allegations do not include any important questions of federal law which have not been settled by the lower courts.

INTRODUCTION

Respondent, City of Franklin, by its attorney, Jesse A. Wesolowski, submits the following arguments and authorities in response to the Petition submitted by the Bowmans.

DISCUSSION

The Petition is confusing in its mingling of misstatements of law and misstatements of the record throughout its Statement of the Case and its Reasons for Granting the Writ. Franklin has objected to those misstatements in the Statement of the Case and will respond accordingly to the Reasons for Granting the Writ, in the order presented in the Petition.

I. THE SEVENTH CIRCUIT PROPERLY DISMISSED THE STATE CLAIMS

Petitioners argue that the District Court improperly dismissed the state claims with prejudice, in violation of the general rule that the District Court should relinquish jurisdiction over pendent state claims when all federal claims are dismissed before trial, citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) and *Gaff v. Federal Deposit Ins. Corp.*, 814 F.2d 311, 319 (6 Cir. 1987). (Petition at 8) The Petition is correct in its statement of the general rule. The Petition is lacking in its failure to cite a recognized exception to the general rule. The Seventh Circuit correctly stated the general rule and the recognized exception it applied:

> [g]enerally, when all the federal claims are dismissed before trial, the district court should relinquish jurisdiction over any pendent state claims as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Instead of relinquishing jurisdiction by dismissing without prejudice, however, Judge Stadtmueller made a determination on the merits by dismissing *both* the federal and state

> claims with prejudice. This action represents a recognized exception to the general rule stated above: "[I]f it is absolutely clear that the pendent claim(s) can be decided in only one way, the district judge can and should decide [them], to save the time of the state court." *Martin-Trigona v. Champion Federal Sav. & Loan Ass'n*, 892 F.2d 575, 578 (7th Cir. 1989). (App. A at 10)

This "reason" does not present any special or important substance for consideration by this Court.

II. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The District Court recognized and followed its procedural obligations in dismissing the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

> With regard to the standard appropriate to a motion to dismiss, I find that the Seventh Circuit's comments in *Gibson v. City of Chicago* at 910 F.2d 1510 at page 1520, Seventh Circuit case from 1990, quoting *Triad Associates v. Chicago Housing Authority*, 892 F.2d 583 at page 586, the Seventh Circuit case from 1989, and I quote, "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." The allegations of the complaint and any reasonable inferences that can be drawn from them must be taken as true, citing *Hishon v. King & Spaulding*, 467 U.S. 69 at page 73, a 1984 U.S. Supreme Court Case.
>
> Dismissal under Rule 12(b)(6) is appropriate "only if the plaintiff has failed to allege any set of facts upon which relief may be granted,"

citing *Yeksigian v. Nappi*, 900 F.2d 101 at page 102, again a Seventh Circuit case from 1990. (R. 31 at 24)

The Petition repeatedly states and specifically at p. 9, that the district court reviewed "extensive written materials submitted by Waste." (R. 31 at 19, 20, 23 and 27) The "written materials submitted by Waste" were its notice of motion and motion to dismiss and supporting brief. No evidence was presented in those documents. Apparently, petitioners argue that the district court's consideration of the applicable law required the implementation of the disposition procedures for summary judgment under Rule 56.

The underlying assumption of petitioners' argument that the motion to dismiss had to be treated as a motion for summary judgment, is that the attempted claims in the complaint would have been supportable if petitioners were entitled to offer evidence to support them. While Waste Management filed a supporting brief consisting of argument and authority, petitioners filed a brief in opposition to the motion to dismiss, with twenty-two exhibits setting forth purported facts annexed to the brief. (R. 8 and 11) Petitioners noted in their brief in opposition to the motion to dismiss that Waste Management's "Motion to Dismiss under FRCP 12(b)(6) is not supported by documents or affidavits" (R. 11 at 2) and "[a]s with rule 56, when the Court interprets an unambiguous written Exhibit, a question of law for the Court alone is presented." (R. 11 at 4) Before the District Court, petitioners argued for a decision upon the Rule 12(b)(6) motion in their favor, because they provided additional evidence while the movants did not. Before this court, petitioners

now argue for a decision in their favor because the district court allegedly considered the materials petitioners asked it to.

In considering the dismissal of a complaint as patently frivolous or malicious, under 28 U.S.C. §1915(d), this Court in *Neitzke v. Williams*, 492 U.S. 319, 109 S. Ct. 1827, 104 L.Ed.2d 338 (1989), provided:

> Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilities appellate review of a trial court dismissal by creating a more complete record of the case. . . . According opportunities for responsive pleadings to indigent litigants commensurate to the opportunities accorded similarly situated paying plaintiffs is all the more important because indigent plaintiffs so often proceed pro se and therefore may be less capable of formulating legally competent initial pleadings. [Citations and footnotes omitted]. *Id.* at 330.

While the Seventh Circuit took note of William Bowman's *pro se* status in its consideration of Rule 38 sanctions (App. A at 11), William Bowman is an attorney and plaintiff and has represented the plaintiffs throughout

these proceedings, with additional local counsel in Milwaukee, Wisconsin. (R. 1 at 1, 12; R. 11 at Exh. K; R. 31 at 2) These facts and the presentation and argument of the issues upon the Rule 12(b)(6) motion to dismiss, both in support of and in opposition thereto (R. 8 and 9), clearly met the "similar footing" and level playing field goals discussed in *Nietzke, Id.* at 330.

Petitioners further attempt to argue at p. 10 of the Petition that the complaint adequately states a claim against "all defendants based on the deliberate indifference of Franklin in hiring Zimmermann, who also contracted with Waste, as to the constitutional rights of Franklin's citizens," citing *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992). This theory was not raised in the courts below. Nonetheless, question 3 of the Questions Presented by petitioners queries "[w]hether there is a conflict between the 2nd and 7th Circuit as to municipal indifference to illegality." (Petition at i) *Walker* considered whether a municipality's failure to train or supervise its employees constituted deliberate indifference to the constitutional rights of its citizens, sufficient to subject the municipality to liability under 42 U.S.C. §1983. *Walker* is inapplicable to this case. Further, as the issue was neither raised nor decided below, the simple answer to Petitioners' Question Presented is: "no." Again, the petition has failed to present any important reason for consideration of review by this Court.

III. THE DISTRICT COURT'S *SUA SPONTE* DISMISSAL OF CLAIMS WAS PROPER

Petitioners argue that the *sua sponte* dismissal of their claims was erroneous because it thereby denied petitioners of notice and an opportunity to be heard. (Petition at 10) However, Waste Management moved to dismiss all of the causes of action in the complaint, including both federal and state claims, and filed and served its written argument with authorities in support thereof. (R. 7, 8 and 19) Petitioners responded to the motion with written arguments and twenty-two annexed exhibits, including William Bowman's affidavit. (R. 19) All parties were served with notice of the conference call hearing upon the motion to dismiss. (R. 12 and 18) The petitioners had prior notice and an opportunity to be heard.

The District Court recognized its legal obligations upon its decision to dismiss the complaint upon its own motion against Zimmermann and Franklin at the hearing upon the motion to dismiss.

> Although *sua sponte* dismissals without prior notice and an opportunity to be heard are generally frowned upon, citing *Tamari v. Bache & Company, (Lebanon)* S.A.L., 565 F.2d 1194 at page 1198, Seventh Circuit 1977, *cert. denied* 435 U.S. 905, 1978, the Seventh Circuit has acknowledged and indeed been willing to permit such dismissals "so long as a sufficient basis for the court's action is apparent from the plaintiff's pleading," citing *Doe on Behalf of Doe v. St. Joseph's Hospital,* 788 F.2d 411 at page 414, Seventh Circuit Case from 1986.

> The court's reasoning is that "the proper administration of justice requires that a trial judge have substantial control over the proceedings before him," again citing *Doe*, 788 F.2d at 415, quoting from *Flora v. Home Federal Savings & Loan Association*, 685 F.2d 209 at page 212, again a Seventh Circuit Case from 1982. (R. 31 at 26-27)

Other circuits have approved *sua sponte* dismissals of complaints under Rule 12(b)(6): "where it was apparent that the claimant could not possibly prevail"; "where 'a remand would be futile' "; where the "position of the parties on appeal makes clear that a remand of service of process and further pleading would serve no purpose" and "where the claimant cannot possibly win relief." *Baker v. Director United States Parole Com.* 916 F.2d 725, 726 (App. D.C. 1990). [Citations Omitted] *Baker* also discussed a notice requirement of other circuits, but noted: "[s]uch an approach, however, in cases where the plaintiff has not advanced a shred of a valid claim can only lead to a waste of judicial resources." *Id.* at 726.

> However, it is clear that the court does not have to accept every allegation in the complaint as true in considering its sufficiency. Courts have used varying language to draw the line between what is admitted on the motion and what is not. For example, courts have said that they accept the truth of "facts," "material facts," "well-pleaded facts," and "well-pleaded allegations." They also have said they do not accept "legal conclusions," "unwarranted inferences," "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations." *Wright &*

> *Miller,* Federal Practice and Procedure: Civil 2d §1357, pp. 311-318 [footnotes omitted].

The district court's findings that the causes of action attempted in the complaint constituted indisputably meritless legal theories is evidenced by the statements of the court at the hearing upon the motion to dismiss:

> [I]n my view since the Bowmans have not and, more importantly, cannot allege any racial or class-based discrimination, . . . I conclude that the Bowmans cannot state a claim under any circumstances relating to the factual underpinnings of this case under section 1985. . . . I find it patently absurd for the plaintiffs in this case to suggest that Waste Management somehow conspired with the City . . . I find that argument to be less than ingenuous and find no basis to allow the state trespass claim to go forward. . . . Similarly, there is even less reason for the Court to consider as viable their final claim with regard to their inability to sell the property because of the pendency of a potential assessment as amounting to a claim for relief under state law." (R. 31 at 26, 27, 29 and 31)

The Seventh Circuit provided that the District Court "did not abuse [its] discretion by finding that the Bowman's pendent state claims could be decided in only one way, because the are without merit." (App. A at 11)

"[B]oth Franklin and Zimmermann had filed answers to the complaint, . . . [and] did not dispute the adequacy of the complaint." (Petition at 10) This statement is incorrect. Both Franklin and Zimmermann had answered the complaint with affirmative defenses set forth as available under Rule 12(b)(6), alleging that the complaint failed to

state a claim upon which relief may be granted. (R. 5 and 10) Again, the Petition has failed to Provide any important or special reason for review by this Court and has provided further indicia of petitioners' inability to consistently maintain an intellectually honest argument, under an apparent compulsion to support factual contentions which are clearly baseless.

IV. PETITIONERS' DISCUSSION OF EXCLUSIVE STATE JURISDICTION AND THE EASEMENT AND ASSESSMENT DOES NOT PROVIDE SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT.

The discussion at p. 10 of the Petition as to the jurisdiction of state courts over the appeal of a special assessment is in contradiction to the complaint's prayer for a judgment of "permanent injunction against all Defendants prohibiting any attempt to tax the Plaintiffs' property". (R. 1 at 11) Petitioners' argument that damages "are not granted under state law" is a misstatement of the law. Property owners affected by a special assessment of the Village of Germantown, Wisconsin, contended that the assessment constituted a taking of property and a denial of equal protection in violation of the Wisconsin Constitution and the United States Constitution in *CIT Group v. Village of Germantown*, 163 Wis. 2d 426, 471 N.W.2d 610 (Ct. App. 1991).

> Because the assessments were reasonable and fulfill the statutory requirements for an assessment where a municipality proceeds under its police power, there was no taking of property in violation of the Wisconsin Constitution or the

> United States Constitution. Neither was there a violation of the constitutional equal protection clauses since all future users were similarly treated by the assessment and the assessment had a rational basis. *Id.* at 437, 438.

Petitioners were made aware of this decision at the hearing upon the motion to dismiss before the district court. (R. 31 at 5)

The discussion of the "The Easement and the Assessment" again fails to illuminate what legal theory is intended to support petitioners' state claims. (Petition at 11, 12) The district court found that the petitioners cited no legal authority for their position. (R. 31 at 30) The Seventh Circuit also found that the petitioners cited no authority for "the untenable proposition that waste flowing through a sewer under a person's property constitutes a trespass. Finally, we cannot identify any known claims for relief under Wisconsin law that will support the Bowmans' interference claim." (App A at 11)

William H. Bowman executed an easement for the installation of sewers across the subject property. (R. 1 at 10) "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." *Harder v. Maloney,* 251 Wis. 233, 238, 26 N.W2d 830 (1947). Petitioners' trespass claim is not available under state law. In an action for trespass against a state highway commission involving lands previously taken for highway purposes, the Wisconsin Supreme Court recognized under those facts that statutory inverse condemnation procedures were the appropriate remedy.

> Since there is a statutory remedy for lands taken for public use in such cases, it is very evident that if the plaintiff's land has in fact been taken for such use, within the meaning of the constitution and the statutes, that he should have pursued that remedy. Certainly an action of tort will not lie against those making such improvement under statutory power. *Grunwald v. Modern Wrecking Co.*, 18 Wis. 211, 215, 118 N.W.2d 188 (1962).

The Petition has not raised any substantive issue upon the Seventh Circuit's findings of the lack of merit and failure to state claims as to each of the four causes of action in the complaint. Other than describing the fourth cause of action in the complaint as an "interference with prospective business relations" theory at p. 3 of the Petition, the Petition presents no question nor argument relative to this attempted state claim and Franklin assumes petitioners have finally agreed with the lower courts and the respondents, that no claim for relief exists by virtue of such allegations.

CONCLUSION

The complaint within its four corners consists of sweeping legal conclusions cast in the form of factual allegations and fails to state a claim upon which relief may be granted. Petitioners' claims are contradictory and based upon outlandish legal theories, ultimately requiring that they be decided in only one way, because they are without merit. The petition has not presented any special or important reason for granting the writ. The

City of Franklin respectfully requests that the Petition for Writ of Certiorari be denied.

Dated this 3rd day of May, 1993.

JESSE A. WESOLOWSKI
Attorney for Respondent
City of Franklin

131 West Layton Avenue
Suite 300
Milwaukee, Wisconsin 53207
(414) 483-9200

No. 92-1608

Supreme Court, U.S.
FILED
MAY 4 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

LORETTA BOWMAN, WILLIAM H. BOWMAN, WILLIAM H. BOWMAN, JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN,

Petitioners,

vs.

CITY OF FRANKLIN, J.C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC., and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS WASTE MANAGEMENT OF NORTH AMERICA, INC. AND WASTE MANAGEMENT OF WISCONSIN, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CORDELIA S. MUNROE
Counsel of Record

DAVID S. BRANCH

FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East – Suite 1250
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
(414) 271-0130

Attorneys for Respondents, Waste Management of North America, Inc., and Waste Management of Wisconsin, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

No questions are presented that are appropriate for review by this Court pursuant to a writ of certiorari.

PARTIES INVOLVED

The parties involved are correctly stated in the caption. As required by Supreme Court Rule 29.1, the Waste Management respondents provide the following listing of their parent and non-wholly owned subsidiary corporations:

a. Waste Management of Wisconsin, Inc.
   Parent corporation: Waste Management, Inc.
   Non-wholly owned subsidiaries: None

b. Waste Management of North America, Inc.
   Parent corporation: Waste Management, Inc.
   Non-wholly owned subsidiaries: None

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES INVOLVED ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. PETITIONERS PRESENT NO QUESTIONS MERITING CERTIORARI REVIEW OF THE COURT OF APPEALS' DECISION THAT THEIR COMPLAINT FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED 5

A. Petitioners Offer No Substantial Challenge to the Dismissal of Their Claims Pursuant to 42 U.S.C. §§ 1983 and 1985 5

B. Petitioners Have Failed to Identify Any Basis for Certiorari Review of the Seventh Circuit's Affirmance of the Dismissal of Their State Law Claims 7

II. NO ISSUES MERITING CERTIORARI REVIEW ARE PRESENTED BY THE DISTRICT COURT'S ALLEGED CONSIDERATION OF MATERIALS OUTSIDE THE COMPLAINT THAT WERE SUBMITTED BY PETITIONERS 9

III. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (9th Cir. 1978) 10

Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 8, 9

Coyne v. City of Somerville, 972 F.2d 440 (1st Cir. 1992) 11

Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24 (2d Cir. 1988) 11

Gaff v. Federal Deposit Insurance Co., 814 F.2d 311 (6th Cir. 1987) 8

Griffin v. Breckenridge, 403 U.S. 88 (1971) 6

Guidry v. Bank of La Place, 954 F.2d 278 (5th Cir. 1992) 8

Hal Roach Studios v. Richard Feiner and Co., 883 F.2d 1429 (9th Cir. 1989) 10

Miller v. Glanz, 948 F.2d 1562 (10th Cir. 1991) 11

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 6

R.J.R. Services, Inc. v. Aetna Casualty and Surety Co., 895 F.2d 279 (7th Cir. 1989) 11

Taylor v. First of America Bank-Wayne, 973 F.2d 1284 (6th Cir. 1992) 8

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 8

Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) 6, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1367 8

28 U.S.C. § 1367(a) 8

28 U.S.C. § 1367(c)(3) 8

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1985(3) 5, 11, 12

OTHER AUTHORITIES

Fed. R. Civ. P. 12(b) 10

Fed. R. Civ. P. 56 10

No. 92-1608

In The

Supreme Court of the United States

October Term, 1992

LORETTA BOWMAN, WILLIAM H. BOWMAN, WILLIAM H. BOWMAN, JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN,

Petitioners,

vs.

CITY OF FRANKLIN, J.C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC., and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS WASTE MANAGEMENT OF NORTH AMERICA, INC. AND WASTE MANAGEMENT OF WISCONSIN, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, Waste Management of North America, Inc., and Waste Management of Wisconsin, Inc., respectfully pray that the petition for writ of certiorari be denied.

OPINIONS BELOW

Respondents Waste Management of North America, Inc. and Waste Management of Wisconsin, Inc. (hereinafter collectively referred to as "Waste Management") have no objections to petitioners' statement regarding the opinions below, except to note that: (1) the opinion of the District Court for the Eastern District of Wisconsin was not an "unpublished written opinion" but was rendered orally on the record at the conclusion of a hearing on Waste Management's motion to dismiss; and (2) there are substantial numbers of typographical errors in petitioners' reproduction of the opinions below in the appendices to their petition.

STATEMENT OF THE CASE

Waste Management does not object to petitioners' statement listing the parties and counts of petitioners' complaint, other than the characterization of Count IV of the complaint as a claim for interference with prospective business relations. Waste Management also does not object to petitioners' summary of the procedural history of the case, except to note that the "extensive written materials" allegedly submitted by Waste Management consisted solely of Waste Management's motion to dismiss and supporting briefs, and to object to the characterization of the district court's action as "summarily" dismissing petitioners' claims. The district court in fact gave detailed consideration to those claims but concluded they were without merit. The court granted Waste Management's motion to dismiss and *sua sponte* dismissed the

claims as to the other respondents, the City of Franklin ("City") and J.C. Zimmerman Engineering Corp. ("Zimmerman").

In their complaint, petitioners alleged that Waste Management negotiated an agreement with the City to connect Waste Management's Metro Sanitary Landfill to the City's Central City Sewer ("CCS") so as to enable leachate from the landfill to be deposited through a force main, to be constructed at Waste Management's sole expense, directly into the sewer system. Complaint, ¶¶ 15, 17(d), Exhibits 2, 11. A draft version of the agreement with the City, included as an exhibit to petitioners' complaint, indicated that Waste Management was to pay a $600,000 connection fee and, if necessary, pretreat the leachate to comply with the standards of the Milwaukee Metropolitan Sewerage District. *Id.*, Exhibit 11.

Before the agreement with Waste Management was finalized, construction of the CCS was approved by the City's Common Council after a public hearing, based on a publicly available assessment report prepared by Zimmerman. *Id.*, ¶ 17(b)-(d), Exhibits 5, 6, 9. Pursuant to the report, petitioners were assessed approximately $89,000 for a sewer laid in the public right of way abutting their property. Petitioners later challenged this assessment in state court and obtained a reduction of roughly $7,000. *Id.*, ¶ 21, Exhibits 12, 15.

Petitioners allege that they were also assessed approximately $51,000 for an additional segment of the CCS laid in an easement across their property, but were not given notice of this assessment, which they refer to as the "secret" assessment, by the City. *Id.*, ¶ 17(b)-(d). A

portion of Zimmerman's report included as an exhibit to petitioners' complaint states that assessments for sewers in easements would be deferred until the sewer became located in a public street or planned development. *Id.*, Exhibit 5. A second portion of Zimmerman's report also attached to petitioners' complaint shows the $51,000 assessment for the sewer with the notation, "Do not send out – these are deferred per agreement." *Id.*, Exhibit 6. Petitioners do not allege that the $51,000 assessment has ever been billed to or collected from them.

The Seventh Circuit Court of Appeals reviewed the district court's dismissal of petitioners' claims *de novo* and concluded that no claims upon which relief could be granted were stated against any of the respondents. The court therefore affirmed the district court's decision. The court denied respondents' motions for sanctions pursuant to Fed. R. App. P. 38 and Seventh Circuit Rule 38 but stated that the question of the frivolousness of the appeal was "a very close one." Opinion of Seventh Circuit Court of Appeals (reproduced as Appendix A to Petition for Certiorari) at 11 (hereinafter "Seventh Circuit Opinion").

SUMMARY OF ARGUMENT

Petitioners do not challenge the determination of the Seventh Circuit Court of Appeals that they failed to allege key elements of their federal claims against Waste Management, indicating that the decision to dismiss these claims was correct. As to their state law claims, the Court of Appeals decision is in harmony with the decisions of other courts of appeals and this Court in holding that a

district court has discretion to decide such claims on the merits after the federal claims in an action have been dismissed. Finally, the facts are unclear as to what materials, if any, were considered by the district court outside the petitioners' complaint. If the district court did consider extra-pleading materials submitted by petitioners and erred in not converting the motion to dismiss to a motion for summary judgment as a result, any such error was harmless.

Petitioners have identified no conflict among the circuits or with decisions of this Court or other reason why certiorari should be granted. Therefore, the petition for writ of certiorari should be denied.

ARGUMENT

I. PETITIONERS PRESENT NO QUESTIONS MERITING CERTIORARI REVIEW OF THE COURT OF APPEALS' DECISION THAT THEIR COMPLAINT FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED.

A. Petitioners Offer No Substantial Challenge to the Dismissal of Their Claims Pursuant to 42 U.S.C. §§ 1983 and 1985.

Petitioners' complaint attempted to state claims pursuant to 42 U.S.C. §§ 1983 and 1985(3) and under state law. The Seventh Circuit Court of Appeals held that no § 1983 claim was stated against Waste Management because the requirement of state action was not met, and that no § 1985 claim was stated because petitioners had

not alleged the requisite "class-based . . . animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

Petitioners do not challenge these determinations in their petition for certiorari. In fact, they do not even *mention* the § 1985 claim or the state action issue in their argument as to why the writ should be granted, much less identify a conflict with the decisions of other courts of appeal or this Court or other reason for the Court to grant certiorari as to these issues.

Petitioners also do not offer any reason for certiorari review of the Seventh Circuit's determination that they had failed to allege the deprivation of a right secured by the Constitution or laws of the United States, as required in addition to state action for a claim under § 1983. In their list of "Questions Presented," petitioners claim there is a conflict between the Second and Seventh Circuits regarding "municipal indifference to illegality," which they later allege could form the basis for a § 1983 claim. Petition for Writ of Certiorari (hereinafter "Petition") at i, 10. However, no such conflict exists.

The petitioners apparently rely on *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), in which the issue was whether acts by police covering up exculpatory evidence and committing perjury constituted "official policy" of a municipality so as to expose it to liability under 42 U.S.C. § 1983. In resolving this issue, the Second Circuit Court of Appeals set out guidelines for when a municipality's failure adequately to train its employees can amount to a "deliberate indifference to the rights" of others sufficient to satisfy the "official policy" requirement imposed by *Monell v. New York City Department of*

Social Services, 436 U.S. 658 (1978). No such issue was presented by the petitioners' claims or addressed by the Seventh Circuit. There is no conflict between the Seventh Circuit's opinion in the instant case and the Second Circuit's opinion in *Walker*.

Petitioners make no other argument of substance regarding their alleged deprivation of federal constitutional rights by respondents. Their argument that the validity of the so-called "secret" assessment should be decided by the state courts amounts to an acknowledgement that they had an adequate state remedy to correct any error in the assessment, as the Court of Appeals concluded. *See* Seventh Circuit Opinion at n.3.

B. Petitioners Have Failed to Identify Any Basis for Certiorari Review of the Seventh Circuit's Affirmance of the Dismissal of Their State Law Claims.

Petitioners assert that the Seventh Circuit was wrong in affirming the district court's dismissal of petitioners' pendent state law claims with prejudice, given the dismissal of their federal claims for failure to state a claim on which relief can be granted. The Seventh Circuit concluded that the dismissal with prejudice was not an abuse of discretion because the state law claims were meritless and could be decided only one way. Thus, it served the purposes of judicial efficiency for the court to dismiss the claims with prejudice. Seventh Circuit Opinion at 10-11.

The Seventh Circuit's decision applied the proper standard of review and does not conflict with decisions of this Court or other courts of appeal. For cases filed after

December 1, 1990, "supplemental jurisdiction" over state law claims is governed by 28 U.S.C. § 1367. Under this statute, the district court clearly had supplemental jurisdiction over petitioners' state law claims, which arose out of a common nucleus of operative fact with the federal claims. 28 U.S.C. § 1367(a); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988).

If the district court dismisses all claims over which it has original jurisdiction, the court "*may* decline" to exercise supplemental jurisdiction to decide the merits of related state law claims. 28 U.S.C. § 1367(c)(3) (emphasis added). The district court retains discretion to decide such pendent claims on the merits, and its decision in this regard is properly reviewed under an abuse of discretion standard, as the Seventh Circuit did in this case. *Carnegie-Mellon University*, 484 U.S. at 350, 350 n.7; *Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992); *Guidry v. Bank of La Place*, 954 F.2d 278, 285 (5th Cir. 1992).

Petitioners cite *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) for the "implicit" proposition that when all federal claims are dismissed before trial, the court "should" decline to exercise jurisdiction over pendent state claims. Petition at 8. However, in *Carnegie-Mellon University*, the Court stated that this is not a mandatory rule to be applied in all cases. *Carnegie-Mellon University*, 484 U.S. at 349-50, 350 n.7. *See also Guidry*, 954 F.2d at 285. The Sixth Circuit case cited by petitioners, *Gaff v. Federal Deposit Insurance Co.*, 814 F.2d 311 (6th Cir. 1987), also recognizes that the court may exercise its discretion to retain jurisdiction of state law claims after federal claims have been dismissed. *Id.* at 319.

The factors to be considered in such an exercise of discretion are "judicial economy, convenience, fairness, and comity." *Carnegie-Mellon University*, 484 U.S. at 350, 350 n.7. The Seventh Circuit properly considered these factors in affirming the dismissal of petitioners' state law claims with prejudice. Certainly as to Waste Management those claims were frivolous, given petitioners' failure to allege any conduct by Waste Management other than the fact that waste from Waste Management's property was to travel through the portion of the Central City Sewer constructed on petitioners' property. Judicial economy and convenience would not have been promoted by dismissing such patently meritless claims without prejudice, to have them resurface and require review by a state court later.

The Seventh Circuit's review of the district court's decision applied the proper standards and is in harmony with prior decisions of this Court and other courts of appeal. Certiorari should not be granted to review a decision that correctly applies an abuse of discretion standard to affirm the dismissal of claims that were obviously without merit.

II. NO ISSUES MERITING CERTIORARI REVIEW ARE PRESENTED BY THE DISTRICT COURT'S ALLEGED CONSIDERATION OF MATERIALS OUTSIDE THE COMPLAINT THAT WERE SUBMITTED BY PETITIONERS.

Petitioners assert that the district court considered "extensive written materials submitted by [Waste Management]" in ruling on Waste Management's motion to

dismiss, and therefore the court should have converted the motion to dismiss to a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b) and disposed of it as provided in Fed. R. Civ. P. 56. It is not clear whether the district court's several comments about its review of the parties' "written submissions" were intended to refer to *briefs* or other documents. Whatever the district court was referring to, however, it was not materials outside the complaint submitted by Waste Management. In making its motion to dismiss, Waste Management did not submit or rely on any such materials but maintained at all times that it was moving to dismiss based on the complaint itself and its attached exhibits. Exhibits attached to the complaint are properly considered as part of the pleading on review of a motion to dismiss. *Hal Roach Studios v. Richard Feiner and Co.*, 883 F.2d 1429, 1441 n.18 (9th Cir. 1989); *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978).

It was *petitioners*, not Waste Management, who filed a number of exhibits outside of the complaint and relied on those exhibits in opposing Waste Management's motion to dismiss. *See* "Motion Exhibits" attached to Plaintiffs' Answering Brief Opposing Defendant's Motion to Dismiss, 9/6/91. Waste Management objected to the submission of these materials and explicitly asked the court *not* to consider them. *See* Waste Management's Reply Brief, 9/20/91, at 2-3.

Even if the district court is assumed to have considered exhibits outside the complaint that were submitted by petitioners, and to have erred in doing so, that error would be to the detriment of Waste Management, not petitioners. Indeed, the district court may in effect have

given petitioners a "double boon," by allowing them to supplement their complaint "while enjoying the benefit of the more deferential Rule 12(b)(6) standard of review." *Coyne v. City of Somerville*, 972 F.2d 440, 445 (1st Cir. 1992).

Petitioners cite no case that demonstrates a conflict with the Seventh Circuit's decision affirming the district court's dismissal of petitioner's claims. The only case cited that involved materials submitted by the *plaintiff* was also a case where the affidavit submitted, if used to supplement the allegations of the complaint, would have remedied its deficiencies. *See Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25-26 (2d Cir. 1988). In contrast, the district court in the instant case found that petitioners' documentation *contradicted* the allegations of their complaint.

The Court of Appeals conducted a *de novo* review of the dismissal of the complaint and concluded that petitioners had failed to state any claims upon which relief could be granted. In seeking certiorari review, petitioners, as discussed previously, make no argument whatsoever that the court's determination on two key points, the "class-based animus" required for a claim under 42 U.S.C. § 1985(3) and the state action required for a claim under 42 U.S.C. § 1983, was in error. Nor do they point to any evidence they would have offered on these points had they been given an opportunity to submit further materials. Thus, if the district court did err, petitioners have failed to identify how they were harmed by that error or how review by this Court could produce a different outcome. *See Miller v. Glanz*, 948 F.2d 1562, 1565-66 (10th Cir. 1991); *R.J.R. Services, Inc. v. Aetna Casualty and Surety Co.*, 895 F.2d 279, 280-81 (7th Cir. 1989).

III. CONCLUSION

Petitioners have not identified any conflicts between the decision of the Seventh Circuit in this case and decisions of this Court or other courts of appeals. Nor have they shown that the Seventh Circuit's decision departed from the usual course of judicial proceedings so as to warrant the exercise of this Court's power of supervision. Furthermore, petitioners do not challenge the Seventh Circuit's key determinations on the merits as to why no federal claims were stated by them against Waste Management pursuant to 42 U.S.C. §§ 1983 and 1985(3). In summary, petitioners have failed to present any reasons why this Court should exercise its discretion and select this case for review under its certiorari jurisdiction.[1]

---

[1] Because the claims against Waste Management were not dismissed *sua sponte*, Waste Management has not discussed the issue raised by petitioners regarding such dismissal, but does not believe it is a question that should receive certiorari review under the circumstances of this case. The Court of Appeals' decision not to permit petitioners to introduce new evidentiary materials regarding Waste Management at the appellate court level was so obviously correct that the sixth question on petitioners' list of "Questions Presented" has also not been separately addressed.

Waste Management therefore respectfully requests the Court to deny the petition for writ of certiorari.

Respectfully submitted,

CORDELIA S. MUNROE
Counsel of Record

DAVID S. BRANCH

FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East – Suite 1250
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
(414) 271-0130

Attorneys for Respondents, Waste Management of North America, Inc., and Waste Management of Wisconsin, Inc.

May, 1993